

UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND

CHAMBERS OF  
J. FREDERICK MOTZ  
UNITED STATES DISTRICT JUDGE

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April 11, 2005

Re: MDL-1586- *In re Mutual Funds Investment Litigation*; ICI Subpoena

Dear Counsel:

I have reviewed the letters you have submitted, and the transcript of the oral argument held on March 2, 2005, in connection with the question of whether I should stay enforcement of the subpoena issued to the Investment Company Institute (“ICI”) by plaintiffs in *Carl Kircher and Robert Brockway, et al v. Putnam Funds Trust, et al. and Evergreen International Trust, et al*, Cause 03-L-1255 (Circuit Court, Third Judicial District, Madison County, Illinois) (“*Kircher/Brockway*”). The subpoena seeks, *inter alia*, the following broad categories of documents:

- ! All documents that relate, directly or indirectly, to market timing and market timing transactions in Fund shares.<sup>1</sup>
- ! All documents that relate, directly or indirectly, to actual, estimated or potential dilution in Fund share values or Fund assets associated with or resulting from market timing in Fund shares.
- ! All documents that relate, directly or indirectly, to the actual, estimated or potential costs associated with or resulting from market timing in Fund shares.
- ! All documents that relate, directly or indirectly, to any policies or procedures considered or recommended by any person to prevent or restrict market timing or short term trading in Fund shares.
- ! All documents that relate, directly or indirectly, to the policies and procedures utilized by any Fund in calculating daily fund NAV from 1998 to the present and the identity of the persons involved in formulating, promulgating, implementing or enforcing such policies and procedures.

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“Fund” is described to “mean any open-end mutual fund, closed end mutual fund, exchange traded fund or unit investment trust including but not limited to ICI members.”

- ! All documents that relate, directly or indirectly, to any communication by the ICI with any person(s) concerning: (a) the determination of Fund NAV's; (b) fair value pricing of Fund assets; (c) market timing transactions or activities; (d) the use of fair value pricing procedures; (e) any rules or regulations of the Securities Exchange Commission or compliance with such rules or regulations; (f) the provisions of the Investment Company Act of 1940 or the Investment Advisers Act of 1940 or compliance with those statutes; (g) corporate governance issues; and/or (h) any state or federal regulatory investigation or proceeding relating to any of the foregoing subjects.
  
- ! All documents that relate, directly or indirectly, to any meetings during which any of the following subjects were addressed, considered or discussed: (a) the determination of Fund NAV's; (b) fair value pricing of Fund assets; (c) market timing transactions or activities; (d) the use of fair value pricing procedures; (e) any rules or regulations of the Securities Exchange Commission or compliance with such rules or regulations; (f) the provisions of the Investment Company Act of 1940 or the Investment Advisers Act of 1940 or compliance with those statutes; (g) corporate governance issues; and/or (h) any state or federal regulatory investigation or proceeding relating to any of the foregoing subjects.
  
- ! All documents that relate, directly or indirectly, to the circumstances under which any Fund should or would employ fair value procedures to determine the value of securities held by the Fund in calculating daily fund NAV, any procedures or information used or available to detect those circumstances, any factors considered in developing such valuation procedures and any methodologies used to fair value price such securities.
  
- ! All documents that relate, directly or indirectly, to any communications or contacts between the ICI and any Fund or other person regarding compliance or non-compliance with the federal or state securities laws and regulations, including without limitation: (a) the Investment Company Act of 1940; (b) the Investment Advisers Act of 1940; (c) 17 CFR ¶ 270.22c-1; (d) 17 CFR ¶ 270.38a-1; (e) Accounting Series Release ("ASR") No. 219 (May 31, 1977); (f) ASR No. 113; (g) ASR No. 118; (h) SEC Division of Investment Management: December 1999 Letter to the ICI Regarding Valuation Issues; (i) SEC Division of Investment Management: April 2001 Letter to the ICI Regarding Valuation Issues and/or (j) any rules, regulations, no action letters, guidance letters or statements or policy statements of the SEC relating to fair value pricing and or market timing transactions.

Plaintiffs contend that I should not stay enforcement of the subpoena because *Kircher/Brockway*, in which it has been issued, is brought against certain defendants, the Evergreen

entities, who are not parties to the MDL proceedings.<sup>2</sup> However, the subpoena is not limited to the documents in ICI's file relating to the Evergreen entities, but encompasses documents relating to every member of ICI. Moreover, the subpoenaed documents go to the very heart of the matters in issue in the MDL proceedings. Thus, the subpoena is quite unlike the limited discovery requests I addressed in my letter ruling dated September 1, 2004, in *Jackson v. Van Kampen*, another case pending in the Third Judicial District, Madison County, Illinois, that pertained only to funds that are not parties in the MDL. The subpoena in issue here would require production of virtually every document in ICI's files concerning market timing and late trading, including documents relating to defendants in the MDL proceedings, which plaintiffs in the MDL proceedings cannot now obtain because of the automatic stay imposed under the PSLRA. Although my colleagues and I have lifted that stay to a limited extent, *see 3/11/05 letter order in MDL 15861, and 3/24/05 letter orders in MDL 15864*, our rulings would not permit plaintiffs in the MDL to obtain the documents encompassed by the ICI subpoena.

Against this background I find that enforcement of the ICI subpoena would substantially interfere with the MDL proceedings and contravene the discovery stay here in effect. I also find that the course of action proposed by counsel in *Kircher/Brockway* - for them to agree not to share with plaintiffs' counsel in the MDL proceedings the documents produced by ICI in response to this subpoena and then produce the same documents at ICI's direction in response to later subpoenas - simply would not be workable. Accordingly, I find that a stay of the enforcement of the subpoena is "necessary in aid of . . . this court's jurisdiction" and "to protect or effectuate its judgments." *See* 15 U.S.C. §78 u-4(b)(3)(D). The stay can, of course, be lifted at a further stage of the MDL proceedings after the pending motions to dismiss have been decided.

Judge Blake and Judge Davis have authorized me to advise you that they concur with the views I have expressed in this letter.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

J. Frederick Motz  
United States District Judge

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<sup>2</sup>*Kircher/Brockway* is also brought against Putnam entities, who are parties in the MDL proceedings. That fact, however, is not the basis for my ruling.